# Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-34 OF 1997
SITI NORMA YAAKOB, DENIS ONG AND HAIDAR JJCA
7 NOVEMBER 1999

***Civil Procedure*** *— Appeal — Record of appeal — Whether order to be included in appeal record must be a sealed order — Whether exceptionally good grounds for non compliance for which court may exercise its discretion — Rules of the Court of Appeal 1994 r 18 sub-r 4(d)*

***Civil Procedure*** *— Appeal — Appeal to Court of Appeal — Whether chronology of events must be submitted to registrar — Rules of the Court of Appeal 1994 r 18 sub-r 10*

The plaintiffs filed an action against the defendants seeking, inter alia, for an order to nullify the sale of 682,500 shares of MGR Corp Sdn Bhd to the third defendant, by the first defendant vide shares sales agreement dated 1 September 1992. After a full hearing, the learned judge dismissed the suit with costs. The plaintiffs (appellants) appealed. The respondents raised two preliminary objections, ie: (i) only the draft order was in the appeal record; and (ii) no chronology of events has been submitted to the Registrar of the Court of Appeal.

**Held,** dismissing the appeal:

(1) In construing the word 'order' in r 18 sub-r 4(d) of the Rules of the Court of Appeal 1994 ( the Rules), the order to be included in the appeal record must be a sealed order and not a draft order (see p 339E–F). As it is incumbent upon the appellants' solicitors to prepare the appeal record, it is also incumbent upon them to take the necessary steps as prescribed by O 42 r 8(3) and (4) of the Rules of the High Court 1980 and not use the disagreement of the solicitors for the third respondent as an excuse for not extracting the sealed order (see p 340B).

(2) Rule 18 sub-r 10 of the Rules requires that the chronology of events be submitted to the registrar for which the appellants had failed to do (see p 340E–F). Rules are made to be obeyed by all the parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion. In this case, there were no exceptional or good grounds for the court to exercise its discretion (see p 341A).

**[Bahasa Malaysia summary**

Plaintif-plaintif telah memfailkan tindakan terhadap defendan-defendan dan memohon, antara lain, suatu perintah untuk membatalkan penjualan 682,500 saham-saham MGR Corp Sdn Bhd

kepada defendan ketiga, oleh defendan pertama melalui perjanjian penjualan saham bertarikh 1 September 1992. Selepas suatu perbicaraan penuh, hakim perbicaraan telah menolak guaman tersebut dengan kos. Plaintif (perayu) telah merayu. Responden-responden telah membangkitkan dua bantahan awal: (i) hanya deraf perintah terdapat di dalam rekod rayuan; dan (ii) tiada kronologi peristiwa yang dihantar kepada Pendaftar Mahkamah Rayuan.

**Diputuskan**, menolak rayuan tersebut:

(1) Di dalam menafsirkan perkataan 'perintah' di dalam k 18 sub-k 4(d) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah tersebut'), perintah yang patut dimasukkan di dalam rekod rayuan mestilah perintah bermeterai dan bukan deraf perintah (lihat ms 339E–F). Oleh kerana ia adalah kewajipan peguam perayu-perayu untuk menyediakan rekod rayuan, ia juga adalah kewajipan mereka untuk mengambil langkah-langkah yang perlu seperti yang diperuntukkan oleh A 42 k 8(3) dan (4) Kaedah-Kaedah Mahkamah Tinggi 1980 dan tidak menggunakan ketiadaan persetujuan peguam-peguam bagi responden ketiga sebagai alasan untuk tidak mengambil perintah bermeterai (lihat ms 340B).

(2) Kaedah 18 sub-k 10 Kaedah tersebut memerlukan kronologi peristiwa dihantar kepada pendaftar di mana perayu-perayu telah gagal berbuat demikian (lihat ms 340E–F). Kaedah dibuat untuk dipatuhi oleh semua pihak-pihak kecuali terdapat alasan yang sangat baik untuk ketidakpatuhan di mana mahkamah boleh melaksanakan budi bicara. Dalam kes ini, tiada alasan yang baik atau luar biasa untuk mahkamah melaksanakan budi bicaranya (lihat ms 341A).]

**Notes**

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 865–890.

**Cases referred to**

*Ahmed Abdul Rakman v SPK Sentosa Corp Bhd & Anor* [1998] 4 MLJ 311 (refd)

*Alloy Automotive Sdn Bhd v Enkei Automotive Co Ltd & Anor* [1997] 3 MLJ 205 (refd)

*Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 (refd)

*Syarikat Telekom (M) Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 (refd)

*Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420 (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 38(1)(a)
Court of Appeal Practice Direction No 1 of 1995
Rules of the Court of Appeal 1994r 18 sub-rr 4(d), 7, 10
Rules of the High Court 1980 O 19 r 3, O 42 r 8(3), (4)
Supreme Court Practice Direction No 1 of 1992

**Appeal from:** High Court Civil Suit No 22–109–93 (High Court Pulau Pinang)

*R Thayalan* (*YS Leong*) (*Low Hop Bing, Koh Kong & Associates*) for the appellants.

*Tan Lip Gay* (*Leong Ng & Tan*) for the first respondent.

*Ghazi Ishak* (*Ong Kheng Leng* with him) (*Ghazi & Lim*) for the second respondent.

*RJ Manecksha* (*Surinder Singh* with him) (*Ong & Manecksha*) for the third respondent.

**Haidar JCA** (delivering judgment of the court): The suit, the subject of the appeal before us, is in respect of an action by the plaintiffs against the defendants seeking, inter alia, for an order to nullify the sale of 682,500 shares of MGR Corp Sdn Bhd to the third defendant, by the first defendant vide shares sales agreement dated 1 September 1992. The first defendant was represented by its managing director, the second defendant. The plaintiffs alleged, inter alia, that the agreement dated 1 September 1992 is not valid and is an attempt to defraud the shareholders and the particulars are set out in para 14 of the amended statement of claim. Various prayers including an injunction are sought by the plaintiffs in para 20 of the amended statement of claim.

The directors of the first defendant resolved to acquire 682,500 shares of MGR Corp Sdn Bhd (which subsequently went public) on 8 January 1992 from one Loi Lung Kiong. The acquisition was approved by MGR Corp Sdn Bhd on 10 January 1992.

The first plaintiff is a family company. The second to seventh plaintiffs are brothers, all by the same father. The fifth and the seventh plaintiffs are from the same mother, the others from another mother. The first defendant is a family company started by two brothers, the father of the second to the seventh plaintiffs and the father of the second defendant. So, the second defendant is a cousin of the second to the seventh plaintiffs. The third defendant who is not related to any of the parties, is the purchaser of 682,500 shares of MGR Corp Sdn Bhd (formerly known as MGR Timber Marketing Sdn Bhd) from the first defendant. The plaintiffs are shareholders (totaling 43.5%) of the first defendant. The second defendant has about 25.6% shares in the first defendant.

After a full hearing, the learned judge dismissed the suit with costs. The plaintiffs (appellants) appealed.

When the appeal came for hearing before us, counsel for the appellants applied for an adjournment on the ground that the second appellant is a

bankrupt. He informed us that he could not proceed without the sanction of the official assignee citing s 38(1)(a) of the Bankruptcy Act 1967. He could not tell us when the second appellant was made a bankrupt. However, he said that he was advised of the second appellant's position in early October this year and wrote to the official assignee for the sanction. The official assignee advised that he needed time to consider and counsel produced a letter from the official assignee to that effect. At the same time counsel also informed us that the third appellant may have been declared a bankrupt as well and he needed time to check on this.

Quite apart from the bankruptcy issue, counsel also informed us that he was advised by the second and the third appellants that Mr Tan Lip Gay acted for them in the Alor Setar High Court suit and there could possibly be a conflict of interest. Mr Tan Lip Gay of M/s Leong & Co, had served on counsel for the appellants a notice of change of solicitors. Counsel for the appellants said that he needed time to verify on this conflict of interest issue as well.

In reply, Mr Tan Lip Gay, counsel for the first respondent admitted that he did act for the second and third appellants in the Alor Setar High Court suit as intimated by counsel for the appellants. However, according to Mr Tan Lip Gay, the Alor Setar High Court suit has no relevance to the present case — it was a banking matter and had been disposed of by the Federal Court.

We regret to note that the counsel for the appellants has not been candid in that he did not disclose to us that he had earlier written a letter to the learned President of the Court of Appeal seeking for adjournment of this appeal on the ground of the bankruptcy of the second appellant. Dato' Ghazi Ishak, counsel for the second respondent, informed us of the application of the appellants to the learned President as it was objected to by the respondents on the grounds:

(1) the appeal was fixed at the behest of the appellants;

(2) common solicitors act for all the appellants;

(3) the decision appealed against was made on 31 January 1997.

Dato' Ghazi Ishak also informed us that the appellants' application for an adjournment was rejected by the learned President by letter dated 4 November 1999.

Under these circumstances, the application for adjournment before us was strenuously objected to by the respondents.

In the course of arguments, it appears that the appellants did not include a sealed copy of the order of the High Court in the appeal record and counsel for the appellants indicated that he needed time to do so. Hence the reason for the adjournment quite apart from the other grounds stated earlier on. Obviously, counsel for the appellants became aware of the omission of the sealed order of the High Court when counsel for the first respondent gave notice that the first respondent would raise the omission by way of a preliminary objection at the hearing of this appeal.

A We then decided to hear the preliminary objection as the success of such an objection would determine the appeal. In the event the objection failed, we would then give due consideration to the application for adjournment.

Counsel for the first respondent relied on two grounds in his B preliminary objection. They are:

(1) only the draft order was in the appeal record but not the sealed order.

(2) no chronology of events has been submitted to the Registrar of the Court of Appeal.

C *Only the draft order is in the appeal record but not the sealed order*

This ground was conceded by counsel for the appellants.

Counsel for the first respondent submitted that as only the draft order was filed in the appeal record but not the sealed order, the appeal was not properly before us and was therefore defective for non-compliance with r 18 D sub-r 4(d) of the Rules of the Court of Appeal 1994 ('the RCA') which provides that a copy of the judgment, decree or order appealed from shall form part of the appeal record (see r 18 sub-r 7 of the RCA).

The then Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 in construing a fair E copy of the judgment and a draft judgment held that the fair copy of the judgment should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980 ('the RHC'). A draft judgment is not a judgment since a draft implies that it needs perfection and approval. No doubt in *Hasil Bumi*, it was a claim under O 19 r 3 of the RHC, but nonetheless, we would respectfully take the same approach in F construing the word 'order' in r 18 sub-r 4(d) of the RCA. In other words, the order to be included in the appeal record must be a sealed order and not a draft order.

Counsel for the appellants relying on the judgment of this court in *Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420 submitted that as the sealed order was not available, the appellants may later include it in a G supplementary record. The judgment of this court, though obiter, would appear to be in consonant with the Practice Direction No 1/92 of the Supreme Court which was adopted by the Court of Appeal with certain modifications vide its Practice Direction No 1 of 1995. However, we ask why no supplementary record was filed by the appellants? According to H counsel for the appellants, the draft order was approved by them and returned to M/s Ong & Manecksha who prepared it in the first place. After that nothing was heard from M/s Ong & Manecksha. In rebuttal, Mr Manecksha, counsel for the third respondent, disclaimed receipt of the approved order from the appellants' solicitors. In our view the solicitors for the appellants should not have left the matter so. It is open to them to I invoke the provisions of O 42 r 8(3) and (4) of the RHC 1980 which read:

(3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar,

of which notice shall be given to the other, to settle the terms of the judgment or order. A

(4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a judge, any party may require the matter in dispute to be referred to the judge for his determination.

As it is incumbent upon the appellants' solicitors to prepare the appeal record it is also incumbent upon them to take the necessary steps as prescribed by O 42 r 8(3) and (4) of the RHC and not use the disagreement of the solicitors for the third respondent as an excuse for not extracting the sealed order. B

*No chronology of events submitted to the Registrar of the Court of Appeal* C

Counsel for the first respondent referred us to r 18 sub-r 10 of the RCA which reads:

> The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry. D

He submitted that the failure by the appellants to comply with r 18 sub-r 10 of the RCA would mean that the appeal record is also defective, and cited *Ahmed Abdul Rakman v SPK Sentosa Corp Bhd & Anor* [1998] 4 MLJ 311 as authority. E

Counsel for the appellants admitted that they have not submitted the chronology of events to the registrar. However, they contended that they were not required to serve the chronology of events on the respondents' solicitors. That might well be so but r 18 sub-r 10 of the RCA certainly requires that the chronology of events be submitted to the registrar for which they admittedly failed to do so. F

This court in *Ahmed*'s case had the occasion to consider, inter alia, a breach of r 18 sub-r 10 of the RCA as well. In stressing the duties of solicitors to be vigilant at all times due regard must also be given to the rules thereby confirming an earlier judgment of this court in *Alloy Automotive Sdn Bhd v Enkei Automotive Co Ltd & Anor* [1997] 3 MLJ 205 by the following passage at p 209, of the report: G

> This court viewed that there was a blatant disregard by the appellant's solicitors of the court's procedure. It is also the view of this court that to a certain extent, the appellant could not escape and was partly to share for the delay in the filing of the appeal record. The appellant, we feel, should have been more vigilant and alert as to the state of its pending matter. We feel the appellant should have the attentiveness to check on the action of the solicitors it employed and paid for. If the case was delayed, the appellant should have pursued the matter as a diligent litigant and even to the extent of firing its solicitors and changing to a new solicitor who could do a better job. After all, it was paying and had the right to call the tune. The appellant was the master and the solicitors were only its agent. We could not subscribe and sympathize with the appellant's counsel's submission that his client presumed everything was in order until the letter from the Court of Appeal dated 29 June 1995. H I

In spite of the strong caution in *Alloy Automotive*'s case, it seems to us that solicitors generally take an indolent attitude in seeing to the compliance of the rules. We must emphasize that rules are made to be obeyed by all the parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion. We would reiterate what Eusoff Chin, SCJ (as he then was) in the Supreme Court case of *Syarikat Telekom (M) Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 at p 423 said:

> Further, it has been held by the courts that rules of court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 and *Ratnam v Cumarasamy & Anor* [1964] 3 All ER 933; [1965] 1 WLR 8.

Counsel for the second and the third respondents adopted the argument of counsel for the first respondent.

In the circumstances, we agreed with the submission of counsel for the respondents and upheld the preliminary objection. There were no exceptional or good grounds for us to exercise our discretion. The appellants and their solicitors are to be blamed for the situation they put themselves in. We regrettably have no alternative, though it may be harsh, but to dismiss the appeal with costs on the ground that the appeal was not properly before us. We ordered the deposit to be paid to the respondents to account of their taxed costs.

*Appeal dismissed.*

Reported by Benjamin Yong